United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

ORIGINAL

76-1559

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P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT MICHAELSON,

Defendant-Appellant

PETITION FOR REHEARING
WITH A SUGGESTION FOR REHEARING EN BANC

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FILED
APR 13 1977

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1559

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UNITED STATES OF AMERICA,

Appellee,

-v-

ROBERT MICHAELSON,

Appellant.

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PETITION FOR APPELLANT

TO THE HONORABLE COURT:

On March 31, 1977, this Court (Feinberg, Oakes, and Gurfein, Circuit Judges) unanimously affirmed the judgment of conviction of the Appellant, ROBERT MICHAELSON, entered in the United States District Court for the Southern District of New York, (Honorable Kevin T. Duffy, Judge) for violation of 18 U.S.C. §§1001 and 2 (aiding and abetting the filing of a false document with the United States Department of State) as well as an order of the same court denying Appellant's motion to withdraw his plea of guilty to the aforementioned charge.

In this proceeding, Appellant moves this Court for a rehearing of the March 31, 1977 opinion or for the direction of an en banc Court to redetermine whether the court below was justified in denying Appellant's motion to withdraw his plea under Fed. R. Crim. P. 32(d), especially in light of this Court's recent ruling in United States v. Journet, 544 F.2d 633 (2d Cir., 1976) and Fed.R. Crim. P. 110. Further, Appellant reviews the question of

whether the actions of the Government at the time of sentencing, as well as that of the sentencing Court, were indeed fair and proper.

THE FACTS

Appellant was indicted in mid-1976 along with six co-defendants for conspiracy to file false documents and to violate the Gun Control Act of 1968, as well as facilitation of the filing of three false documents with the State Department. On the morning of trial, two co-defendants pled guilty. Plea negotiations continued with the defendant MICHAELSON during which the Government opened.* At that time, (September 22, 1976), the Appellant changed his plea of not guilty to one of guilty to aiding and abetting Count Four of the indictment [Appendix (A) at page 19].

It is important to note that during the entire time that these events took place, discussions of a possible disposition of the case were going on. In addition, the Court and the prosecution were well aware that Appellant's defense at trial would be that of entrapment [Appellant's brief (AB) at page 4]. Not a single witness was called until Appellant was removed from the trial.

The trial eventually continued and the two remaining defendants were later found guilty. Part and parcel of the Government agreement in Appellant's plea bargain was that they would take no position at the time of sentencing, and that the plea to the single count of the indictment would cover the entire indictment. United States v. Michaelson, Slip Op. No. 728 (3/31/77) at 2619.

On November 16, 1976, Appellant's counsel examined the pre-sentence report and discovered that, contrary to this arrangement, the Government had gone

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*During this entire period of time, plea negotiations were taking place. [Appellant's Reply Brief (ARB), Footnote at page 3].

beyond a mere statement of the facts of the case, in fact, had assessed culpability, giving each of the defendants a placement in terms of blameworthiness. Because Appellant's counsel felt that this was a clear indication as to sentencing recommendation, additional time was asked for so that an extensive response to the pre-sentence report could be prepared. This request was denied and, on November 19, 1976, Appellant moved to withdraw his plea of guilty. Four days later, the motion was denied, and on November 22, 1976, Appellant was sentenced by Judge Duffy to five years imprisonment.

I.

APPELLANT'S PLEA WAS NOT PROPERLY TAKEN WITHIN THE REQUIREMENTS OF FED. R. CRIM. P. 11, AND MUST, THEREFORE, BE VACATED.

The panel below recognized that the Appellant's claim that his plea was improperly taken was "substantial"[Slip Op. at 2621] in that he was not advised of provisions of Fed. R. Crim. P. 11. As the opinion notes, and the Government concedes, Judge Duffy did not advise the Appellant, as he was required to do, of the provisions of Rule 11(c)(3). [Defendant cannot be compelled to incriminate himself]; and Rule 11(c)(5) [If defendant pleads guilty and answers questions from the Court under oath, these questions may later be used against him in a prosecution for perjury or false statement]. Id.

Within this Circuit, the rule of United States v. Journet, supra, vitalizes the technical requirements outlined in Rule 11. As the panel said:

> "In Journet, we considered the effect of the recent Amendments to abreviated Fed. R. Crim. P. 11 and stated that '... unless the defendant is specifically informed of each and every element enumerated in R. 11, the plea must be vacated.'" (Emphasis supplied). Slip Op. at 2620.

Additionally, in a footnote to the cited material, this Court noted that the amended Rule 11 became effective on December 1, 1975 - almost a year before the Appellant herein took his plea. In point of fact, this Court, in Journet,

declared that to personally inform the defendant of each and every right and other matter set out in Rule 11 was to be considered a minimum instruction, "Otherwise," this Court said, "the plea must be treated as a nullity". United States v. Journet, supra, Slip Op. at 377.

Two arguments patently rejected by the panel in Michaelson were the ones denominated "harmless error" and "non-retroactivity". The former argument had been rejected in Journet (544 F.2d 636) and the latter was non-convincing as "[that] argument" the Court stated, "must face the undeniable fact that Congress did prescribe December 1, 1975 - well before the plea in the case - and the effective date of the Amendments to Rule 11." Slip Op. at 2622.

The panel decided to ignore the decision in Journet and the mandates of Rule 11 and, instead, affirmed the decision below on the grounds that "vacating Appellant's guilty plea would be a needlessly rigid reading of amended Rule 11 and of Journet." Slip Op. at 2622.

It appears that the panel divided their rationale for affirmance into two distinct sectors. The first was addressed to the failure of Judge Duffy to specifically advise the Appellant that the Court had the right to place him under oath and ask him questions at the time of the taking of his plea, and further, that if the Court did do this, any statements he might make under oath could be used against him in any subsequent prosecution for perjury or false statement. Rule 11(c)(5).

Harking back to the discarded Journet, the Court ignored the strict wording of the Congressional mandate in Rule 11 and instead decided that since it was not "the custom within this Circuit for Judges to place the defendant under oath in such a situation, that there was at least a minimum of flexibility in applying Rule 11(c)." Slip Op. at 2622.

The panel found support in a footnote to Journet which stated:

> "We recognize that, unlike the practice of some other Circuits, the District Courts

> in this Circuit do not follow the custom of placing the defendant under oath before questioning him in connection with the acceptance of his guilty plea. However, since the Court has the right to do so and Rule 11(c)(5) is phrased in mandatory terms, it is advisable to give the warning to the defendant."

Journet, supra, 544 F.2d at 632, n. 6; Michaelson, Slip Op. at 2623 (emphasis supplied).

Without more, it would seem that Journet recognized that Rule 11(c)(5) is mandatory and therefore, even though the custom in this Circuit does not seem to ordinarily follow, it would be a technical requirement of the Congressional mandate of amended Rule 11 to so advise the defendant that even though in reality, the Judge might not place him under oath, the Judge taking the plea could place him under oath, as this was his power, and that if such a turn of events came to bear, any statement he would make in that situation could be utilized against him at a later time. Strange then, that the panel, in the case at bar, felt that the phrase "it is advisable" held for something more. As the opinion states:

> " [I]t indicates some leeway for assessing the failure to give this advice, at least when, as here, defendant was not put under oath before questioning about his guilty plea."

Slip Op. at 2623.

Suffice it to say, that the Congressional enactment of Amended Rule 11 which demands that the Court taking the plea address the defendant personally and advise him of each and every one of his protections under Rule 11(c) has been effectively abrogated by the overbroad reading of the phrase, "it is advisable".

The second sector of judicial examination in terms of the Rule 11 argument was the failure of the court below to specifically advise the Appellant that he retained, up until the time he took his plea, the right not

to be compelled to incriminate himself. The panel recognized that this "raises more of a problem" [Slip Op. at 2623] than the prior handling of Rule 11(c)(5). Even though this Court's own decision in Journet in no way, shape or form allowed for any departure from the strictures of Rule 11(c)(3), the panel deemed that the failure in this case by the court below comply with the mandates of Rule 11, if enforced by allowing the Appellant to withdraw his plea and go to trial, "would be a needlessly rigid construction of Rule 11". Slip Op. at 2623.

The panel undoubtedly did not realize the gravity of Amended Rule 11 and the support for that purpose in Journet. It is hard to analyze the reasoning of the panel for, although the panel did go into a complex factual analysis to show that Appellant "probably" knew that he retained his right not to incriminate himself[1] it then went on to say - in direct contravention to its prior exercise -

> "[W]e realize that a main purpose of the Amendments to Rule 11 and its strict reading in Journet is to avoid all such fine inquiries by establishing a detailed prophylactic check list."

Slip Op. at 2623.

After arguably creating a double standard under Rule 11, i.e. the taking of a plea pre-trial as opposed to the taking of a plea post-trial[2] this Court went on to deny to Appellant the protections of Rule 11, stating by implication

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1. The panel seemed to equate the Appellant's knowledge with the competence of his attorney. While counsel appreciates the panel's opinion of his skills, he must doubt whether Congress and this Court would allow his client to be penalized - or at the very least deprived - as a result of this very same expertise.

2. This Court is reminded [see ARB at 3] that no trial had actually begun as against the Appellant. His plea of guilty was taken before he had an opportunity to open and also before any witness was sworn in the case. As has been stated previously, the Government and the Court were well aware that extensive plea negotiations were taking place throughout this period of time. Therefore, even were this Circuit to develop within the context of Rule 11, a double standard not placed there by Congress, Appellant would still have the right to have his plea evaluated under either criteria.

that these protections were not extant until such time as Journet created them. Clearly, this is not the case.

The mere fact that for the panel to support the affirmance of the actions of the court below, it had to indulge in speculation and conjecture, should be enough for this Court to reconsider. The language of the panel is obvious guesswork: "Michaelson must have known his rights." Slip Op. at 2623 (Emphasis supplied).

Had the strictures of Rule 11 been complied with, the phrase "must have known his rights" would instead read "did know his rights". Journet recognizes this, accepts this and requires this.

For the panel to conclude that their decision in Michaelson "is not to be interpreted as overruling Journet in any respect" [Slip Op. at 2624], is beyond reason. Were this to be an accurate statement and, if future litigants in this Circuit, and other Circuits as well, are to apply Journet as case law, (whether it be precedent or merely persuasive) how can Michaelson be balanced against the following:

> "It now appears that Congress, by its recent Amendment to Rule 11, has decided to mandate just such a course [enumerating each and every right waived by the pleader under Rule 11] in lieu of requiring Appellate Courts to interpret the old Rule's general guidelines in a case by case basis. Section (c) of the new Rule 11 provides that, before accepting a guilty plea, the Court 'must' personally inform the defendant in open Court of specifically enumerated rights and other matters pertaining to the question of whether the plea is a voluntary and knowing one. It is difficult to conceive of clearer language."

Journet, Slip Op. at 375 (emphasis supplied).

Appellant would submit, therefore, that unless this Court wishes to overrule the sum and substance of Journet and further to ignore the requirements of Rule 11, as amended by Congress, that Appellant should be granted

permission to withdraw his plea of guilty.

II.

NOTWITHSTANDING THE HOLDING IN JOURNET, REVERSAL IS REQUIRED DUE TO THE FACT THAT THE COURT BELOW ERRED IN FAILING TO ALLOW THE WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY PURSUANT TO FED. R. CRIM. P. 32(d).

The Appellant argued to the panel that the District Judge had abused his discretion in not permitting Appellant to withdraw his plea of guilty. While the panel agreed that "the Supreme Court has 'not previously answered' the question 'under what circumstances a defendant, prior to sentencing, may withdraw a guilty plea'." Slip Op. at 2618 citing Neely v. Pennsylvania, 411 U.S. 954 (1973), (emphasis in original) it disagreed with Appellant's suggesting the applicable test as "the defendant 'may withdraw his plea of guilty prior to sentencing when he has good reason to do so and the Government has proffered no (or insufficient) reason not to allow it.'" Slip Op. at 2617.

The panel felt that this Circuit had, in fact, developed a standard and that the standard was "that the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal, taking into account any prejudice to the Government." Slip Op. at 2618 (citation omitted).

It is doubtful whether even this standard, if any different from the one advanced by Appellant, could have been utilized to bar the review of the District Court's denial of Appellant's motion to withdraw under Rule 32(d). Unmentioned in the panel's opinion, yet raised by the Appellant [ARB at 2] and uncontroverted by the Government, was the fact that the proseuction had never claimed that to retry the Appellant would work any prejudice at all, at the District Court level [A50-53]. For the court below to have denied Appellant's motion to withdraw without such a showing of prejudice would have to be clearly erroneous", and, therefore, within the panel's own wording of this

Circuit's rule as to such matters. Such prejudice would have had to have been raised at the District Court level. Neely v. Pennsylvania, supra at 959. Furthermore, not just any "prejudice" will do. "Substantial prejudice" is what should be required. United States v. Stayton, 408 F.2d 559, (3d Cir.) (1969).

In light of the foregoing, this Court should rehear Appellant's claims with an eye towards conforming any decision in this case with the case law in this Circuit, other circuits, and the feelings of the Supreme Court. [Withdrawal should be allowed in the Court's discretion "if for any reason the granting of the privilege seems fair and just". Kercheval v. United States, 274 U.S. 220, 224 (1927) as cited in Michaelson, supra, Slip Op. at 2617; accord. ABA Standards Relating to Pleas of Guilty, §2.1(b).]

Appellant renews his points of argument which deal with what is forwarded as a "good reason" for the withdrawal of the plea, as outlined to the penal. [AB 10-18; ARB 1-13].

Appellant would especially take issue with the panel's analysis of the facts of the case and the allocution at the time of the taking of the plea. Slip Op. at 2619-2620. In point of fact, Appellant renews his contention with innocence as opposed to even marginally supportive of guilt.

CONCLUSION

Appellant renews each and every point brought before the panel heretofore and specifically shows to this Court more than sufficient reason to hold that the court below abused its discretion in denying Appellant the right to withdraw his plea of guilty under Rule 32(d) as well as failing to advise the Appellant as required by Rule 11. Moreover, the opinion of the panel has failed to adequately balance the facts of the case against the standard for withdrawal of plea under Rule 32(d) and has misconstrued and failed to accord Appellant

equal protection under the law in its application of Rule 11 and this Court's decision in United States v. Journet, supra.

Accordingly, the order of the court below should be reversed, the judgment of conviction vacated and this case sent back to the court below for trial on the merits.

Dated: New York, New York
April 12, 1977

Respectfully submitted,

BARRY IVAN SLOTNICK,
for ROBERT MICHAELSON

JAY L.T. BREAKSTONE
Law Assistant
On the Petition

ATTORNEY'S CERTIFICATE

BARRY IVAN SLOTNICK, attorney for defendant-appellant, ROBERT MICHAELSON, hereby certifies that the within petition is presented in good faith and not for reasons of delay.

Barry Ivan Slotnick

BARRY IVAN SLOTNICK
Attorney for Defendant-Appellant
ROBERT MICHAELSON

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 13 day of April 1977 deponent served the within Petition upon

U.S. Atty., So. Dist. of NY

attorney(s) for

Respondent

in this action, at

1 St. Andeews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 13 day of April , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978